

FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA
(DIVISION 2)

**Nguyen v Minister for Immigration, Citizenship, Migrant Services and
Multicultural Affairs [2022] FedCFamC2G 266**

File number: MLG 1908 of 2017

Judgment of: **JUDGE LADHAMS**

Date of judgment: 14 April 2022

Catchwords: **MIGRATION** – judicial review of decision of Administrative Appeals Tribunal – refusal to grant Partner (Temporary) (Class UK) visa – whether Tribunal failed to put applicant on notice of issues – whether Tribunal breached s 360(1) of the *Migration Act 1958* – whether Tribunal failed to consider evidence - no jurisdictional error – application dismissed

Legislation: *Migration Act 1958* (Cth), ss 5F, 360, 476, 477
Migration Regulations 1994 (Cth), reg 1.15A, Schedule 2 cl 801.321, 820.211, 820.221

Cases cited: *He v Minister for Immigration and Border Protection* (2017) 255 FCR 41; [2017] FCAFC 206
Minister for Immigration and Border Protection v SZSRs (2014) 309 ALR 67; [2014] FCAFC 16
Minister for Immigration and Citizenship v SZGUR (2011) 231 CLR 594; [2011] HCA 1
Minister for Immigration and Citizenship v SZRKT (2013) 212 FCR 99; [2013] FCA 317
SZBEL v Minister for Multicultural and Indigenous Affairs (2006) 228 CLR 152; [2006] HCA 63
SZMUF v Minister for Immigration and Citizenship [2009] FCA 182
Van Dung v Minister for Minister for Immigration and Border Protection [2021] FedCFamC2G 106

Division: Division 2 General Federal Law

Date of hearing: 26 November 2021

Place: Perth

Number of paragraphs:	82
Counsel for the Applicants:	Mr A Aleksov
Solicitor for the Applicants:	Clothier Anderson & Associates
Counsel for the First Respondent:	Mr C Hibbard
Second Respondent	Submitting appearance, save as to costs
Solicitor for the Respondents:	Clayton Utz

ORDERS

MLG 1908 of 2017

FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 2)

BETWEEN: THI NAM NGUYEN
First Applicant

ELAINE BAO TRAM TRAN NGUYEN, BY HER
LITIGATION GUARDIAN THI NAM NGUYEN
Second Applicant

QUOC THANG TRAN NGUYEN, BY HER LITIGATION
GUARDIAN THI NAM NGUYEN
Third Applicant

AND: MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT
SERVICES AND MULTICULTURAL AFFAIRS
First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

ORDER MADE BY: JUDGE LADHAMS

DATE OF ORDER: 14 APRIL 2022

THE COURT ORDERS THAT:

1. The application is dismissed.

Note: The form of the order is subject to the entry in the Court's records.

Note: The Court may vary or set aside a judgment or order to remedy minor typographical or grammatical errors (r 17.05(2)(g) *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth)), or to record a variation to the order pursuant to r 17.05 *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth).

REASONS FOR JUDGMENT

JUDGE LADHAMS:

INTRODUCTION

1 By way of application filed on 1 September 2017, the applicants seek judicial review of a decision made by the Administrative Appeals Tribunal (Tribunal) on 2 August 2017. The Tribunal affirmed an earlier decision made by a delegate of the Minister not to grant the applicants Partner (Temporary) (Class UK) visas (partner visa). The application is filed pursuant to s 476 of the *Migration Act 1958* (Cth) (Migration Act).

2 For the reasons explained below, I find that there is no jurisdictional error in the Tribunal decision. It follows that the application to this Court is dismissed.

BACKGROUND

3 The first applicant is a non-citizen who applied for the partner visa on 6 March 2014 on the basis of her relationship with the sponsor, Mr Van Tai Nguyen (sponsor). The first applicant and sponsor were married in December 2013. The first applicant is the primary visa applicant on the partner visa application and the second and third applicants, who are the children of the first applicant, are secondary visa applicants.

4 On 11 November 2015 a delegate of the Minister made a decision not to grant the applicants partner visas. The delegate was not satisfied that the first applicant met the criteria in cl 820.211(2) of Schedule 2 to the *Migration Regulations 1994* (Cth) (Regulations), which required that, at the time of the visa application, the first applicant was the spouse or de facto partner of the sponsor. The delegate found that the first applicant did not meet the definition of ‘spouse’ under s 5F of the Migration Act. The delegate also found that the second and third applicants did not meet the primary criteria in cl 820.211 and that they did not meet the criteria for secondary applicants in cl 801.321 of the Regulations.

5 On 30 November 2015 the applicants applied to the Tribunal for review of the delegate’s decision.

6 The first applicant appeared at a hearing before the Tribunal on 21 April 2017 to give evidence and present arguments. The sponsor also gave evidence at this hearing.

7 On 2 August 2017 the Tribunal affirmed the decision under review.

TRIBUNAL DECISION

8 The Tribunal identified that the issue for its consideration was whether the first applicant was the spouse of the sponsor at the time of the partner visa application and at the time of the Tribunal decision, in accordance with the definition of ‘spouse’ in s 5F of the Migration Act.

9 The Tribunal accepted that the first applicant and sponsor were validly married to each other on 21 December 2013.

10 In deciding whether the first applicant was the spouse of the sponsor, the Tribunal considered the factors in reg 1.15A(3) of the Regulations.

Financial aspects of the relationship

11 The Tribunal was not satisfied that bank statements for a joint account, showing transactions for periods between 2014 and 2017, realistically showed how the family unit had been operating their combined resources and was not persuaded that the joint bank account was a meaningful working account in which the first applicant and sponsor saved their limited resources and spent money to cover their basic living costs as a family.

12 The Tribunal found that the first applicant and the sponsor gave contradictory evidence in relation to matters such as how they proposed to finance a home, and considered that if the first applicant and sponsor had a shared vision of purchasing property together they would have a common understanding of how they would pay for that property.

13 Overall, the Tribunal placed minimal weight on the evidence in relation to how the first applicant and sponsor might have financial and legal obligations to one another and the day-to-day sharing of household expenses for a family unit.

The nature of the household

14 The Tribunal accepted that the first applicant and sponsor were living at the same address, together with several students, but was not persuaded that they were living as spouses. The Tribunal placed limited weight on joint utility bills and furniture receipts, and noted that there was limited evidence of the first applicant and sponsor paying rent together.

15 The Tribunal considered that there was little to indicate that the children were being cared for by both parties. It acknowledged documentary evidence showing school fees in joint names, but noted that it was unclear who was paying these fees.

16 The Tribunal placed some weight on photographic material depicting the first applicant and sponsor with relatives of the first applicant and with others, but expressed concerns that the photos may not be a genuine reflection of a family unit that has been together since April 2013.

17 Overall, the Tribunal placed some weight on the evidence to show that the applicants and sponsor live as a family and that the first applicant and sponsor have realistic joint responsibility for care and support of the children and are both responsible for the household's expenses.

Social aspects of the relationship

18 The Tribunal expressed concerns about the limited attendance at the wedding ceremony by family members of the first applicant and the sponsor. The Tribunal identified inconsistencies in the first applicant's and sponsor's answers when questioned about events that occurred after the wedding, and found it of concern that the sponsor's adult children had not made any effort to recognise the marriage or to provide support for it.

19 The Tribunal placed limited weight on statutory declarations from third parties which stated that the first applicant and sponsor were in a genuine relationship and that the sponsor came to accept responsibility for the applicant's two children. The Tribunal placed some weight in favour of the applicants on statutory declarations submitted by the first applicant's aunt and sister which stated that the first applicant's relationship with the sponsor was genuine, despite the Tribunal's view that these statutory declarations provided limited insight into the workings of the relationship in circumstances where the first applicant had an indiscretion with her former husband while entering a de facto relationship with the sponsor.

20 In considering whether the first applicant and sponsor represent themselves to other people as being married to each other, the Tribunal accepted that the first applicant is raising two young children and it would not be expected that she and the sponsor would have an extensive social life. However, the Tribunal considered that the limited support for the relationship by family members and their limited understanding of its trajectory raised concerns that the relationship may have been entered into for the purpose of the first applicant gaining a migration outcome.

Nature of the first applicant's and the sponsor's commitment to each other

- 21 The Tribunal accepted that it was plausible that the first applicant had a 'one-off encounter' with her former husband when she was about to enter into a de facto relationship with the sponsor and did not place adverse weight on this. The Tribunal noted that, when questioned how he felt about the first applicant's pregnancy from this 'one-off encounter', the sponsor said that he understood the first applicant's situation. The Tribunal considered it to be implausible that the sponsor would not have initially had some doubts about the applicant's commitment to him. The Tribunal considered the first applicant's evidence that her former husband had not come to visit his children in the last 12 months and that he had disappeared to be implausible.
- 22 The Tribunal considered the evidence of the first applicant and sponsor that they have long term plans together to purchase property to be unconvincing. The Tribunal had difficulty gauging the degree of companionship and emotional support the first applicant and the sponsor drew from each other, and was not satisfied that the evidence submitted supported the contention that the sponsor is the first applicant's children's step-father with fatherly obligations.

Tribunal's conclusion

- 23 Based on the above findings the Tribunal was not satisfied that the first applicant and the sponsor have a mutual commitment to a shared life to the exclusion of others and that their relationship is genuine and continuing. It was not satisfied that the parties live together and not separately and apart on a permanent basis, even though they share a residence.
- 24—The Tribunal found that the requirements of s 5F of the Migration Act were not met at the time the visa application was made and at the time of the Tribunal decision. Accordingly, the Tribunal found that the first applicant did not meet cl 820.211 and 820.221 of the Regulations.-

PROCEEDINGS BEFORE THIS COURT

- 25 The application for judicial review was filed on 1 September 2017. This is within 35 days of the date of the Tribunal decision, as required by s 477(1) of the Migration Act.
- 26 By an amended application filed on 12 October 2021, the applicants advance the following two grounds of review:

1. The Tribunal failed to notify the applicant of an issue in the review, being the Tribunal's expectations to hear evidence about the sponsor's emotional reconciliation to the applicant's infidelity.
2. The Tribunal failed to consider important evidence, being:
 - a. Evidence that the sponsor was an emergency contact at the children's school, contrary to the Tribunal's belief to the opposite.
 - b. Evidence that the sponsor had persuaded the applicant not to have an abortion despite her wish to do so.
 - c. Evidence of the sexual relationship between the applicant and the sponsor.

27 The applicants filed written submissions on 12 October 2021 and the Minister filed written submissions on 26 October 2021. The matter came before me for hearing on 26 November 2021. The applicants were represented by Mr Aleksov and the Minister was represented by Mr Hibbard.

28 The evidence before the Court comprised the court book and an affidavit of Catherine Jane Farrell affirmed and filed on 12 October 2021 which annexed a transcript of the Tribunal hearing.

GROUND 1

Applicants' submissions

29 The applicants submitted that the process of the sponsor's emotional reconciliation to the first applicant's one-night stand with her ex-husband was a substantial issue in the Tribunal's review that seems to have been decisive. The Tribunal had an expectation that the sponsor would give evidence about deep emotional processes.

30 The applicants submitted that the need for such evidence is not contemplated by reg 1.15A of the Regulations, and that there is nothing in the statutory regime or broader materials that suggested the first applicant could have seriously been expected to anticipate the possibility that evidence of that specific kind might be needed to get a favourable outcome. As such, the Tribunal's expectation in this regard was an issue in the review and the Tribunal should have put the first applicant on notice and given her an opportunity to lead evidence on the matter.

31 The applicants submitted that the Tribunal did not ask any questions that might have elicited evidence of this issue, and the only line of questioning that could be said to go to this issue was whether 'she was committed to [the sponsor]'. The applicants submitted that the

Tribunal's failure to put the first applicant on notice of this issue was a failure to comply with s 360(1) of the Migration Act.

32 In his oral submissions, Mr Aleksov submitted that the Court should have regard to the words used by the Tribunal in its decision to identify the 'issue', and referred in particular to the Tribunal's comment at [60] of its reasons that:

... The Tribunal's concerns rest with the fact that the [first applicant's encounter with her ex-husband] has been airbrushed from the parties' narrative and the Tribunal is not convinced that the birth of a child to a former husband during the establishment of another relationship is not something that can simply be dismissed as having little impact on the relationship with the sponsor.

33 Mr Aleksov submitted that the issue was not obvious from the statutory arrangements or from the circumstances of the case prior to the Tribunal hearing and the issue was not drawn to the applicants' attention. He further submitted that if the Tribunal wanted to know more about the sponsor's emotional reconciliation to the fact that the first applicant conceived a child to another man, it had to ask him. Mr Aleksov submitted that a critical aspect of the Tribunal's reasoning adverse to the first applicant and sponsor was that there was something missing from the sponsor's evidence. In these circumstances it was incumbent on the Tribunal to let the first applicant know this state of affairs so that, if necessary, she could take whatever steps were needed to fill the gap.

Minister's submissions

34 The Minister submitted that there is no basis to say that any one factor, let alone the particular factor raised by this ground, was decisive in the Tribunal decision. When read fairly and as a whole, the Tribunal addressed each of the requirements in reg 1.15A of the Regulations and considered the evidence that related to each requirement.

35 The Minister submitted that the Tribunal's consideration of the extent to which the sponsor reconciled himself to the first applicant's infidelity, and the fact he purported to act in a fatherly way to a child born of that infidelity, was relevant to the Tribunal's consideration of 'the nature of the persons' commitment to each other' for the purposes of reg 1.15A(3)(d) and in particular reg 1.15A(3)(d)(iv) which required the Tribunal to consider 'the degree of companionship and emotional support that the persons draw from each other'.

36 The Minister also submitted that, in any event, the Tribunal's obligation in s 360(1) of the Migration Act is to the applicants, not the sponsor, and the first applicant was on notice that these issues were relevant because:

- (a) in a letter to the applicant dated 23 March 2017, the Tribunal advised the first applicant that:

In considering your review application we must take into account certain matters regarding the relationship between the visa applicant and the sponsor. These matters include the financial and social aspects of the relationship, the nature of the household, and the **nature of each person's commitment to the relationship**. We request that if you wish to rely on any additional evidence at the hearing relevant to these matters you please provide the evidence no later than 14 April 2017.

- (b) the delegate said, under the heading Nature of the Persons' Commitment to each other:

You then married on 21/12/2013 and on 2/1/2014 you gave birth to your second child, whom was fathered by your previous husband as evidenced by the child's birth certificate.

...

I have drawn the conclusion that you may still be in a relationship with your previous partner.

- 37 The Minister submitted that the nature of the applicant's and sponsor's commitment to each other, in a context where the applicant had given birth, during the course of the relationship with the sponsor, to a child whose father was the applicant's ex-husband, was plainly in issue.

Resolution

- 38 There is no real dispute between the parties as to the legal principles relevant to ground 1. Both parties accept that the Tribunal was required to put the applicants on notice of issues in the proceeding that were not obvious. The ground is based on the High Court decision in *SZBEL v Minister for Multicultural and Indigenous Affairs* (2006) 228 CLR 152; [2006] HCA 63. In that case, Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ said at [35]:

The Tribunal is not confined to whatever may have been the issues that the delegate considered. The issues that arise in relation to the decision are to be identified by the Tribunal. But if the Tribunal takes no step to identify some issue other than those that the delegate considered dispositive, and does not tell the applicant what that other issue is, the applicant is entitled to assume that the issues the delegate considered dispositive are 'the issues arising in relation to the decision under review'.

- 39 The High Court also said that [47] and [48]:

47. First, there may well be cases, perhaps many cases, where either the delegate's decision, or the Tribunal's statements or questions during a hearing, sufficiently indicate to an applicant that everything he or she says in support of the application is in issue. That indication may be given in many ways. It is not necessary (and often would be inappropriate) for the Tribunal to put to an applicant, in so many words, that he or she is lying, that he or she may not be accepted as a witness of truth, or that he or she may be thought to

be embellishing the account that is given of certain events. The proceedings are not adversarial and the Tribunal is not, and is not to adopt the position of, a contradictor. But where, as here, there are specific aspects of an applicant's account, that the Tribunal considers *may* be important to the decision and may be open to doubt, the Tribunal must at least ask the applicant to expand upon those aspects of the account and ask the applicant to explain why the account should be accepted.

48. Secondly, as Lord Diplock said in *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry*:

the rules of natural justice do not require the decision maker to disclose what he is minded to decide so that the parties may have a further opportunity of criticising his mental processes before he reaches a final decision. If this were a rule of natural justice only the most talkative of judges would satisfy it and trial by jury would have to be abolished.

Procedural fairness does not require the Tribunal to give an applicant a running commentary upon what it thinks about the evidence that is given. On the contrary, to adopt such a course would be likely to run a serious risk of conveying an impression of prejudgment.

40 In *Minister for Immigration and Citizenship v SZGUR* (2011) 231 CLR 594; [2011] HCA 1, French CJ and Kiefel J said at [9]:

... Procedural fairness requires a decision-maker to identify for the person affected any critical issue not apparent from the nature of the decision or the terms of the statutory power. The decision-maker must also advise of any adverse conclusion which would not obviously be open on the known material. However, a decision-maker is not otherwise required to expose his or her thought processes or provisional views for comment before making the decision.

41 The issue between the parties in the present case is the level of specificity with which the Tribunal needs to identify the issue to an applicant. A further issue is whether the Tribunal needs to put a witness on notice rather than the applicant themselves.

42 The answer to the second issue is that the Tribunal did not have any obligation to put the sponsor on notice of any issue in the proceeding. This question was considered by Judge Riley in *Van Dung v Minister for Minister for Immigration and Border Protection* [2021] FedCFamC2G 106 at [259]-[264]. Judge Riley considered cases cited by the parties in that matter and concluded that it was not a breach of s 360 of the Migration Act not to put an issue to the sponsor. I agree with the reasoning of Judge Riley. In any event, the applicants in the present matter appeared to accept that the procedural fairness duty in s 360 of the Migration Act is to the applicants and not the sponsor.

43 In relation to the level of specificity with which the Tribunal needs to identify the issues, the Federal Court (Flick J) said in *SZMUF v Minister for Immigration and Citizenship* [2009] FCA 182 at [22]:

Wherever the line may be drawn in individual cases, a party must be sufficiently put on notice of those matters which place him in a position where he can meaningfully avail himself of an opportunity to be heard. But procedural fairness does not require “a running commentary upon an applicant’s prospects of success, so that there is a forewarning of all possible reasons for failure”: *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* [2001] HCA 22 at [31], 206 CLR 57 at 69 per Gleeson CJ and Hayne J.

44 It is clear from the authorities cited above that:

- (c) the Tribunal was required to put the applicants on notice of the dispositive issues in the proceeding in sufficient detail so that they had a meaningful opportunity to be heard on those issues; and
- (d) the Tribunal was not required to disclose to the applicants its thought processes.

45 In the present case, when regard is had to the Tribunal’s reasons as a whole, as well as the conduct of the review and hearing, I do not accept the applicants’ submission that the Tribunal erred by failing to put the applicants on notice that the sponsor’s emotional reconciliation to the first applicant’s infidelity was a dispositive issue in the review.

46 In my view, the issue about which the Tribunal needed to put the applicants on notice was that the first applicant’s encounter with her previous husband at the commencement of her relationship with the sponsor, which resulted in the birth of a child, might cause the Tribunal to have doubts about the nature of her claimed relationship with the sponsor, and in particular, the nature of the commitment.

47 The letter of 23 March 2017, in which the Tribunal put the first applicant on notice that the nature of her and the sponsor’s commitment to each other was an issue in the review, does not on its own sufficiently put the applicants on notice of the determinative issues. However, in my view, the delegate’s decision (referred to at [36(b)] above), in conjunction with the questioning of the Tribunal at the hearing, was adequate to put the first applicant on notice that her encounter with her former husband at the start of the relationship with the sponsor may cause the Tribunal to have doubts about the genuineness of her relationship with the sponsor.

48 The following exchange took place between the Tribunal member and the applicant at the hearing:

- MS GAGLIARDI: Whose child? Who's the father of that child?
- INTERPRETER: The child is my husband's — ex-husband's child.
- MS GAGLIARDI: So you met Mr Nguyen in 2012 but in 2014 you were having a child with your ex-husband ... Do you want to explain that to me?
- INTERPRETER: Yes. Yes, at the time my ex-husband was visiting us too and he told — and then he tried to convince me and try — attempt to reconcile with me. And then I felt — um — because I am a woman so I felt a little bit like convinced and then we slept it with each other and then I was pregnant.
- MS GAGLIARDI: Mm. Well, you couldn't have been in a mutual — in a mutual commitment with Mr Nguyen then if you were trying to reconcile with your former husband.
- INTERPRETER: Yes. I got to know the — my new husband but he thought really at that time my ex-husband has tried to convince me so that he can — we can come back and continue our relationship. So I felt that it is — it is convincing.
- MS GAGLIARDI: When did you become engaged to Mr Nguyen?
- INTERPRETER: On the 19 August 2013.
- MS GAGLIARDI: So you were already engaged, committed to be in an exclusive relationship with Mr Nguyen but you were also trying to reconcile with your ex-husband?
- INTERPRETER: Yes. At that time I was pregnant already and then my husband advised me that whatever the child belongs to — whatever the father of the child is that he's to keep the child.
- MS GAGLIARDI: He wasn't angry?
- INTERPRETER: At that time I was pregnant after my husband have move into live with me for two months and because I was very honest to him so he has forgiven me for that doing.

49 Later in the discussion about the first applicant's contact with her ex-husband, the Tribunal member said:

- MS GAGLIARDI: See I'm trying to establish that the relationship with the former husband — was ceased — when you were in a claimed genuine, and continuing relationship.

50 The following exchange took place between the Tribunal member and the sponsor at the hearing:

- MS GAGLIARDI: ... Your wife had a child with another man while you were

engaged to her.

INTERPRETER: So that they — her ex-husband just went to visit his children and I don't know — I don't really know if their relationship is going. So it seems I came to move into live with her. So I got to know about her by then — her pregnant — and then I thought it just an accident. So I — and then I — I felt for her and then I understand her circumstances. He — she told me that she wanted to abort the child but I wouldn't agree.

MS GAGLIARDI: But you're already engaged. That doesn't show she was committed to you.

INTERPRETER: We got to know each other in January 2012 and we, and then after that we — we loved each other and then we lived together since April 2013 and in December 2013 we signed the marriage certificate.

51 I acknowledge that the Tribunal did not expressly put the applicant on notice that it expected to see evidence of the sponsor's emotional reconciliation to the applicant's infidelity. The Tribunal did, however, ask some questions that might be relevant to this issue, such as by asking the applicant whether the sponsor was angry and by querying with the sponsor whether the applicant was committed to him.

52 In any event, the extent to which the emotional reconciliation of the sponsor is addressed in the Tribunal's reasons suggests that it formed part of the Tribunal's thought processes and reasoning, rather than an 'issue' in the proceeding. The Tribunal was not obliged to put the applicant on notice of its thought processes. In considering the nature of the first applicant's and the sponsor's commitment to each other, the Tribunal considered a range of circumstances, not just what the applicants have described as emotional reconciliation.

53 The Tribunal said at [56] to [60]:

56. The Tribunal places no adverse weight on the fact that the applicant may have had an encounter with her ex-husband even though she was about to enter into a de facto partnership with the sponsor, after all the applicant and her former partner were not technically divorced until August 2013. A one off encounter such as the one described by the applicant is entirely plausible.

57. When the Tribunal queried the sponsor, however, about how he had felt about the applicant's pregnancy and why he had pursued the relationship in the circumstances, he repeated that he understood her situation. The Tribunal finds it implausible that the sponsor would not have initially at least had some doubts about the applicant's commitment to him and whether the applicant might still not be in a relationship with her former husband. His reasoning for having decided to pursue his relationship with the applicant. Indeed the Tribunal has concerns as to the extent that the applicant has ceased her communications with her former partner. She has claimed that she does not receive child support from her former husband and that he had been

coming to visit his children, but that in the last 12 months he had disappeared and she did not know where he was. The Tribunal finds this somewhat implausible as it has not been explained why the sponsor would suddenly stop seeing his children just because the applicant had re-partnered with the sponsor. This leads to query, given the limited probative evidence submitted under Regulation 1.15A and generally, whether the applicant is not feigning a lack of knowledge of her former husband's whereabouts because the marriage to the applicant has been entered into for the sole purpose of gaining a migration outcome for her and her two children.

58. The Tribunal also finds the parties' claims that they have long-term plans together to purchase property unconvincing. Their evidence at hearing about how they would purchase property was inconsistent and the Tribunal has limited evidence before it that they are indeed pooling their resources for the purposes of the goal of making a legal and financial commitment such as taking on a mortgage.
59. At hearing the sponsor spontaneously advised the Tribunal that if he were not successful he would appeal the decision. He then stated that if the review fails he would go and live with the applicant and her two children overseas, indicating that this ought to be enough to convince the Tribunal that the parties are in a genuine and continuing spousal relationship. The sponsor also stated that she could not live without the support of the sponsor. From the evidence submitted, however, the Tribunal has had difficulty gauging the degree, if any, companionship and emotional support the parties draw from one another.
60. The Tribunal reiterates that this decision does not turn on the fact that the sponsor is not the biological father of the applicant's children. The Tribunal's concerns rest with the fact that the event has been airbrushed from the parties' narrative and the Tribunal is not convinced that the birth of a child to a former husband during the establishment of another relationship is not something that can simply be dismissed as having little impact on the relationship with the sponsor. Nor is the Tribunal satisfied that the evidence submitted supports the contention that the sponsor is the applicant's children's step-father with fatherly obligations.

54 When these paragraphs are viewed as a whole, it is apparent that the Tribunal considered a range of evidence provided by the first applicant and the sponsor that was relevant to its assessment of the nature of the commitment. The Tribunal was not obliged to uncritically accept the evidence provided by the first applicant and the sponsor and it gave cogent reasons for the doubts it had about that evidence. The Tribunal's finding at [57] that it considered it to be implausible that the sponsor would not initially have at least some doubts about the first applicant's commitment to him was open to it. This finding was made taking into account the sponsor's evidence given when the Tribunal expressly put to him that the first applicant's pregnancy to her ex-husband did not show that she was committed to the sponsor.

55 It follows that the Tribunal has not failed to comply with s 360 of the Migration Act. Ground 1 is not established.

GROUND 2

Applicants' submissions

56 The applicants submitted that the Tribunal failed to have regard to the following important evidence when it made its decision:

- (e) The Tribunal failed to engage with the evidence the first applicant wanted to abort the second child, but the sponsor talked her out of it. The applicants submitted that this was directly relevant to the Tribunal's assessment of the nature of the first applicant's and sponsor's commitment to each under reg 1.15A(3)(d)(iii) and (iv) of the Regulations.
- (f) The Tribunal failed to engage with the first applicant's evidence that the sponsor was listed as an emergency contact at her children's school. The Tribunal at [52] of its reasons placed adverse weight on the fact that the sponsor was not listed as an emergency contact for the children with the school and that this was a substantial issue at the Tribunal hearing. The first applicant clarified that she was the primary contact and the sponsor was a secondary contact at the school. The applicants submitted that this evidence was directly relevant to the Tribunal's assessment of the nature of the household under reg 1.15A(3)(b)(i) of the Regulations and had to be considered expressly.
- (g) The Tribunal failed to engage with the evidence that the first applicant and sponsor had sexual relations on their wedding night. This was directly relevant to the Tribunal's assessment under reg 1.15A(3)(d)(iii) and (iv) and had to be considered expressly.

Minister's submissions

57 The Minister submitted that the weight to be given to each of the matters specified in reg 1.15A of the Regulations is a matter for the Tribunal, and that there is no obligation for the Tribunal to refer to every piece of evidence before it.

58 The Minister submitted that none of the matters identified by the applicants in ground 2 were substantial and consequential or went to a 'killer point' in the review.

59 The Minister submitted that the sponsor made 'passing reference' at the hearing to the first applicant wishing to abort her pregnancy but the sponsor did not agree. The Minister submitted that this claim was not raised in support of the applicants' application at any point

in the documents provided to the Tribunal and during the hearing. It was appropriate for the Tribunal to respond to the case as it was advanced by the applicants. The Minister submitted that it is open to infer that the Tribunal did not consider the mention of this issue by the sponsor to be critically relevant, and there is no basis to conclude that it was irrational for it to reach that conclusion.

60 The Minister submitted that the Tribunal did not place adverse weight on the emergency contact issue and instead made fleeting reference to it by way of example only. The Minister submitted that it is not apparent that any weight was placed on this issue at all, and even if there was, there is no basis to find that any misapprehension of evidence was so serious or fundamental to the Tribunal's review that gives rise to jurisdictional error.

61 The Minister submitted that the sponsor's 'passing reference' that he and the first applicant had sexual relations on their wedding night was not evidence that featured in any part of the case advanced by the first applicant. It was open to the Tribunal not to consider that this claim was critically relevant to determining the issues before it.

Resolution

62 In advancing this ground, the applicants rely on *Minister for Immigration and Citizenship v SZRKT* (2013) 212 FCR 99; [2013] FCA 317. In that case, Robertson J said at [111]–[112]:

111. In my opinion there is no clear distinction in each case between claims and evidence: see *SHKB v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 545 at [24], set out at [69] above. The fundamental question must be the importance of the material to the exercise of the Tribunal's function and thus the seriousness of any error. In my opinion the distinction between claims and evidence provides a tool of analysis but is not the discrimin itself. Further, it is important not to reason that because a failure to deal with some (insubstantial or inconsequential) evidence will, in some circumstances, not establish jurisdictional error, then a failure to deal with any (substantial and consequential) evidence will also not establish jurisdictional error.

112. As the Full Court said in *VAAD v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCAFC 117 at [77] whether the Tribunal is obliged to consider a document or documents will depend on the circumstances of the case and the nature of the document. In my opinion, the relevant factors in relation to (corroborative) evidence include first, the cogency of the evidentiary material and, second, the place of that material in the assessment of the applicant's claims. To the extent that the Minister's submissions involved the contention that it is always the case that these matters may be dealt with without reference to the Tribunal's reasons I do not agree.

63 Mr Aleksov also referred me to *Minister for Immigration and Border Protection v SZSRS* (2014) 309 ALR 67; [2014] FCAFC 16 at [54], where the Full Court (Katzmann, Griffiths and Wigney JJ) relevantly said:

... the Tribunal can fail to exercise its jurisdiction or fail to consider a claim in a number of different ways, including by ignoring evidence that is important to a claim, or ignoring evidence that, having regard to the course of its decision-making, acquires importance to the exercise of its jurisdiction.

64 The obligation of the Tribunal, in taking into account the factors set out in reg 1.15A(3) of the Regulations was considered by the Full Court in *He v Minister for Immigration and Border Protection* (2017) 255 FCR 41; [2017] FCAFC 206. The Full Court said at [76]-[77]:

76. In our opinion, the requirement that the Tribunal “consider” the circumstances in reg 1.15A(3) means that the Tribunal is required to make findings upon each of the prescribed matters numbered with Roman numerals. The nature of these specific matters is such that each of them poses, in effect, a question or questions for the Tribunal. For example, in respect of “the nature of the household”, the Tribunal must ask:

- (i) whether there are children and whether there is any joint responsibility for their care and support;
- (ii) what the living arrangements of the persons are; and
- (iii) whether and to what extent there is sharing of the responsibility for housework.

The regulation poses these questions in order to ensure that the Tribunal takes into account particular circumstances of the marriage as part of the active mental process involved in giving proper, genuine and realistic consideration to the prescribed matters. The legislative intention must be that these questions will be answered, not merely thought about. They must be answered so that the circumstances identified by the answers are included in the evaluation of whether there is a “married relationship”. In some cases, the Tribunal’s answer may be that there is no material, or insufficient material, to be able to form a conclusion on a prescribed matter: cf *Paerau* at [27], [69] and [119]. However, there must be an answer, or, in other words, a finding, even if the finding is that no conclusion can be reached upon the matter.

77. So far, we have discussed the requirement for the Tribunal to make findings in respect of the specific matters in reg 1.15A(3) numbered with Roman numerals. It is also necessary to consider whether findings are required in respect of the principal matters in paras (a)-(d), namely the financial aspects of the relationship, the nature of the household, the social aspects of the relationship and the nature of the persons’ commitment to each other. These matters are expressed broadly and it is less obvious that they pose questions that are required to be answered. Nevertheless, they should be seen as doing so, having regard to the questions that are then immediately posed in connection with each of the principal matters. In our opinion, the requirement to “consider” the principal matters means that a decision-maker must make findings upon each of them. In many cases, the requirement to make findings upon the principal matters may be satisfied by the course of making findings

upon the specific matters. For example, the Tribunal may make a finding that the nature of the household is one where the parties have no children, they live together and they share responsibility for housework equally.

65 While it is clear that the Tribunal is required to consider and make findings on each of the factors described in reg 1.15A(3)(a)-(d) and the various sub paragraphs, it does not need to expressly refer to every item of evidence.

66 It is with these principles in mind that I consider ground 2.

Evidence that the sponsor persuaded the applicant not to have an abortion

67 The evidence said to be relevant to this part of ground 2 is extracted at [50] above. In giving his evidence to the Tribunal, the sponsor said that the first applicant wanted to abort the child but the sponsor would not agree. This is said by the applicants to be relevant to the consideration of reg 1.15A(3)(d)(iii) and (iv), which required the Tribunal, in considering the nature of the first applicant's and the sponsor's commitment to each other, to consider the degree of companionship and emotional support that the persons draw from each other and whether the persons see the relationship as a long term one.

68 The Tribunal, in making findings about the nature of the commitment between the first applicant and the sponsor, did not refer to this evidence. It is not readily apparent whether the Tribunal overlooked this evidence or simply considered it to be insufficiently significant in its overall reasons to warrant the Tribunal expressly referring to it. In my view, it is likely that the Tribunal was aware of this evidence. The evidence was given to the Tribunal in response to a specific question of the Tribunal, and the Tribunal has expressly referred in its reasons to other parts of the response to that question.

69 Even if the Tribunal did overlook the evidence, I would not find that it amounted to jurisdictional error. Taking into account the way the evidence was presented in the context of the applicants' overall case, it is not sufficiently cogent or important to the applicants' case that a failure by the Tribunal to consider the evidence would give rise to jurisdictional error.

70 There is insufficient context to the sponsor's evidence for it to meaningfully impact any assessment by the Tribunal of the degree of companionship and support that the first applicant and sponsor draw from each other, or whether they see the relationship as a long term one, particularly in circumstances where the first applicant did not give evidence on this issue. In considering the nature of the commitment, the Tribunal considered the evidence submitted by the parties to support their contention that the sponsor is the stepfather of the

first applicant's children and has fatherly obligations to the children. The Tribunal was not satisfied that the evidence supported that contention. It was appropriate for the Tribunal to have regard to the ongoing role that the sponsor plays in the children's lives in considering the nature of the commitment. However, any suggestion by the sponsor that the first applicant told him that she wanted an abortion but he did not agree could not realistically have aided the Tribunal's consideration of the nature of the commitment, in the absence of any contextual evidence of the role that the sponsor played (if any) in the first applicant's decision to give birth to her second child. The first applicant did not provide any evidence of that, and one can only infer that that is because it did not form any part of her case.

Evidence regarding the emergency contact at the children's school

71 The applicants' submission on this ground is that the Tribunal at [52] of its reasons placed adverse weight on the fact that the sponsor was not listed as an emergency contact for the children with their school. At [52], the Tribunal said:

More current tuition fees in both names have been submitted but given that the applicant is claiming that the sponsor is the step-father of her children and that he treats them as his own, these documents are not persuasive evidence of the sponsor being recognised by the applicant's son as being the step-father who has obligations for the care and support of the child, in the event, for example, the applicant is not able to attend the school in an emergency.

72 The transcript of the Tribunal hearing shows the relevant exchanges between the first applicant and the Tribunal member. After identifying the school that the first applicant's oldest child attends, the following exchange took place:

MS GAGLIARDI: And whose his — who's the emergency contact for him?

INTERPRETER: It's me.

MS GAGLIARDI: All right. Does your husband, Mr Nguyen ever go there to find out how your child is progressing or does he represent himself as the father?

INTERPRETER: No. He's not — he's just — I pick up from the school and then I'm the one who drop him off to the school.

73 The sponsor then gave evidence that was different to the first applicant's evidence. There was then the following further exchange between the first applicant and the Tribunal member:

MS GAGLIARDI: ... Is the school aware of what's happened between you and your ex-husband?

INTERPRETER: Yes, they did because I used to put him in the list but now I put my current husband in the list.

MS GAGLIARDI: But you told me you didn't.

INTERPRETER: No, because I put my contact list — my contacts first and his contacts after me and because he works so in case that the school cannot reach me. So they can reach him.

MS GAGLIARDI: I asked you is your current husband on the contact list now and you said no.

INTERPRETER: I meant that my name is the main contact and he is the second one because I am as the (indistinct) I'm not very — sometimes not very clear.

MS GAGLIARDI: Okay. Well, as I said the evidence will be clear.

74 I interpret [52] differently to the applicants. I do not understand the Tribunal at [52] to be drawing any adverse inference against the first applicant based on any finding, express or implied, that the sponsor is not the emergency contact. Rather, in my view what the Tribunal is saying at [52] is that the documentary evidence provided, namely the tuition fees in joint names, does not show that the sponsor is the stepfather who has obligations to care and support for the first applicant's son. It is implicit in the Tribunal's reasons that documentary evidence of the sponsor being an emergency contact might have demonstrated this.

75 In my view, this does not disclose any jurisdictional error. It was ultimately for the applicants to provide sufficient evidence to persuade the Tribunal that the relationship between the first applicant and the sponsor met the legislative criteria. In circumstances where the oral evidence given by the first applicant and the sponsor was, with respect, confusing, it was open to the Tribunal to look to the documentary evidence for clarification. The Tribunal was required to consider, for the purposes of reg 1.15A(3)(b)(i), whether the first applicant and the sponsor had any joint responsibility for the care and the support of the children. The Tribunal did this, taking into account the whole of the evidence before it.

76 I do not infer from [52] of the Tribunal's reasons that the Tribunal has overlooked any of the first applicant's oral evidence in relation to emergency contacts at the school. Rather, I infer that the Tribunal did not consider the oral evidence of the first applicant and sponsor in relation to the emergency contact information to be sufficiently cogent or persuasive to be material to its assessment of whether the first applicant and sponsor had joint responsibility for the care and support of children. This does not amount to jurisdictional error.

Sexual relations

77 The Tribunal in its reasons did not refer to the sponsor's evidence that he and the first applicant had sexual relations on their wedding night. The applicants say that this evidence

was relevant to the Tribunal's consideration of the degree of companionship and emotional support that the persons draw from each other and whether the persons see the relationship as a long term one.

78 The evidence that the sponsor and first applicant had sexual relations on their wedding night was oral evidence given by the sponsor in response to questions by the Tribunal, which appeared to have been directed to exploring inconsistencies between the sponsor's evidence and that of the first applicant as to what happened on their wedding day. The relevant exchange between the Tribunal member and the sponsor is as follows:

MS GAGLIARDI: ... And anything else happen that night before you went to bed?

INTERPRETER: Yes. We had a sexual relation that night.

MS GAGLIARDI: All right. Okay, that's fine. But before you actually went to bed and had the sexual relations, did you do anything special together?

79 I infer from:

- (h) the circumstances in which the evidence was given;
- (i) the Tribunal's response at the hearing to that evidence; and
- (j) the absence of reference to this evidence in its reasons,
- (k) that the Tribunal did not consider this evidence to be relevant to its assessment of the nature of the commitment between the first applicant and the sponsor.

80 Even if I am wrong in this inference, and the Tribunal instead overlooked the evidence, I would not find that this amounted to jurisdictional error. Evidence of sexual relations between the first applicant and the sponsor on their wedding night, without any explanation of how or why it shows the nature of the commitment, is not evidence which is cogent and important to the first applicant's overall claim to be the spouse of the sponsor, or her case regarding the nature of the commitment.

81 Ground 2 does not establish jurisdictional error.

CONCLUSION

82 In circumstances where I have found that neither ground raised by the applicants establishes jurisdictional error, I dismiss the application.

I certify that the preceding eighty-two (82) numbered paragraphs are a true copy of the Reasons for Judgment of Judge Ladhams.

Associate:

Dated: 14 April 2022